

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in January 2012

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: DISMISSAL ORDER; RES JUDICATA

CASE STYLE: FROST v. BLUEFIELD STATE COLLEGE
DOCKET NO. 2010-1564-BSC (1/12/2012)

PRIMARY ISSUES: Whether the doctrine of res judicata was applicable to preclude the relitigation of the issues.

SUMMARY: This is the same grievance filed by Grievant in 2009. A level three decision was issued on that grievance by the Grievance Board on February 24, 2011, and Grievant did not appeal that decision. This grievance is barred by the doctrine of res judicata. Accordingly, this grievance is DISMISSED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

KEYWORDS: DISMISSAL ORDER; TERMINATION; MOOT; ADVISORY OPINION; RELIEF

CASE STYLE: WELLS v. UPSHUR COUNTY BOARD OF EDUCATION
DOCKET NO. 2009-1490-UPSED (1/24/2012)

PRIMARY ISSUES: Whether this grievance should be dismissed because the relief requested by the Grievant is moot due to the termination of her employment with Respondent.

SUMMARY: The issue of Grievant being placed on a plan of improvement is a moot point since Grievant is no longer an employee of Respondent. Under these circumstances, there is no additional relief that could be granted by the Grievance Board even if Grievant were to prevail on the merits. Accordingly, the grievance is dismissed.

KEYWORDS: POSTING; VACANCY; STUDENT ENROLLMENT; REALIGNMENT; TEACHER

CASE STYLE: COOK v. LOGAN COUNTY BOARD OF EDUCATION
DOCKET NO. 2010-1538-LOGED (1/13/2012)

PRIMARY ISSUES: Whether a position should have been filled as a vacancy instead of a realignment of teachers.

SUMMARY: Grievant asserts that the position for a kindergarten classroom teacher at South Man Elementary School should have been posted as a vacancy upon the previous employee's retirement. Grievant argues that Respondent violated W.Va. Code § 18A-4-7a when it realigned another teacher to fill the kindergarten teaching position instead of posting the vacancy. Because a new kindergarten teacher was needed to fill the vacancy created after a teacher retired, there was no need for Respondent to realign its teachers in this instance. The vacancy was created by a teacher's retirement, not by an influx or decline of students, therefore, W.Va. Code § 18A-4-7a requires that such a vacancy be posted and filled competitively. According, this grievance is GRANTED.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: POSTING; SUMMER ASSIGNMENT; REGULAR SENIORITY;
SUMMER SENIORITY; SUMMER PROGRAM

CASE STYLE: COWAN, ET AL. v. RITCHIE COUNTY BOARD OF EDUCATION
DOCKET NO. 2010-1537-CONS (1/20/2012)

PRIMARY ISSUES: Whether Grievants proved that the summer Bus Operator positions were newly created, and should have been filled based on regular seniority, not summer seniority.

SUMMARY: Grievants argued that the three Bus Operator positions posted for the summer of 2010 were newly created positions, because Respondent had never before called its summer learning program for students "STARS." Grievants argued the positions should have been filled based on regular seniority, not summer seniority. Respondent has operated a summer learning program for students for many years under various names. It has employed Bus Operators to transport students during the summer as federal grant funding allowed, ranging from a maximum of five Bus Operators several summers, to no Bus Operators one summer, and one Bus Operator in the summer of 2009. The three summer Bus Operator positions were not newly created positions, and were properly filled based on summer seniority. Accordingly, this grievance is DENIED.

KEYWORDS: SELECTION; QUALIFICATIONS, AUTISM MENTOR; AIDE; SENIORITY; POSTING; CERTIFICATION; CERTIFICATE; VERIFICATION OF QUALIFICATIONS

CASE STYLE: ESLICK v. WAYNE COUNTY BOARD OF EDUCATION AND MARY PERTEE, INTERVENOR
DOCKET NO. 2011-0303-WAYED (1/12/2012)

PRIMARY ISSUES: Whether verification or certification from the State Department of Education was a prerequisite to Intervenor being qualified for the Autism Mentor position.

SUMMARY: Intervenor was placed in a posted Autism Mentor/Itinerant Aide position rather than Grievant, because she had met all the requirements to be qualified as an Autism Mentor, while Grievant had not. Grievant did not dispute that Intervenor had met all the requirements to be an Autism Mentor, but argued that Intervenor was not qualified to be an Autism Mentor, because the State Department of Education had not issued any certificate or other verification that she had met all the requirements to be an Autism Mentor. Grievant failed to demonstrate that there is any statutory or regulatory requirement that the State Department of Education issue a certificate or other verification that a person has met all the requirements to be qualified as an Autism Mentor. Accordingly, this grievance is DENIED.

KEYWORDS: SICK LEAVE; SALARY; BLOOD PRESSURE; CDL; BUS OPERATOR

CASE STYLE: TIBBS v. HANCOCK COUNTY BOARD OF EDUCATION
DOCKET NO. 2011-1016-HANED (1/4/2012)

PRIMARY ISSUES: Whether Grievant proved that she should be reimbursed for a day and a half she took off work due to her illness.

SUMMARY: Grievant became upset after a conference with the Superintendent, the acting Assistant Superintendent, and the Transportation Director, and went home after the conference, taking a half day of sick leave. Her blood pressure was elevated the next day, and she reported off work on sick leave that day too. She was paid for this day and a half of sick leave. The conference was called by the Superintendent to address an incident involving Grievant. The Transportation Director had conducted an investigation into the incident and summarized his findings and recommendations in writing, addressed to the Superintendent. Grievant was upset because the Transportation Director accused her of being untrustworthy, and recommended the termination of her employment. The Superintendent heard Grievant's side of the story at the conference, and did not impose any discipline on Grievant. Grievant did not demonstrate that anything improper occurred, or that she was entitled to any relief. Accordingly, this grievance is DENIED.

KEYWORDS: SUSPENSION; TERMINATION; INSUBORDINATION; WILLFUL
NEGLECT OF DUTY; DISCRIMINATION; FAVORITISM;
CREDIBILITY; HEARSAY; MITIGATION

CASE STYLE: DAVIS v. CABELL COUNTY BOARD OF EDUCATION
DOCKET NO. 2011-1557-CABED (1/26/2012)

PRIMARY ISSUES: Whether Respondent abused its discretion in suspending and
subsequently terminating Grievant and whether Grievant
demonstrated that the discipline imposed was clearly
disproportionate to her offense.

SUMMARY: Grievant was employed by Respondent as a bus operator. Grievant
was terminated for insubordination and willful neglect of duty for four
incidents of misconduct, the first of which was that without
authorization, she intentionally left three middle school students
unattended at a local chain restaurant for approximately forty minutes
while she drove to the county bus garage. Grievant argues that
Respondent has failed to meet its burden of proof and that her
termination improper was because she was not given the opportunity
to improve before she was terminated. Grievant further asserts
discrimination and favoritism. Given the totality of the circumstances,
the Respondent has demonstrated that Grievant's actions in three of
the four incidents identified were insubordinate and a willful neglect of
duty. Further, Respondent proved that the discipline imposed on the
Grievant was justified. Therefore, this grievance is DENIED.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	DEMOTION; PERSONAL ERRAND; DISCIPLINARY ACTION; ABUSE OF DISCRETION; MITIGATION
<u>CASE STYLE:</u>	<u>MAYNARD v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES</u> DOCKET NO. 2011-1430-DHHR (1/20/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievant's demotion from a Community Services Manager I to a Child Protective Services Worker was justified.
<u>SUMMARY:</u>	<p>Grievant, Community Services Manager I, abused his supervisory position by asking a Case Aide to perform a personal errand for him. Grievant also permitted employees' children in the workplace under certain circumstances. Although Grievant had never received any disciplinary actions during his 19 years of employment for Respondent, Respondent demoted Grievant to a Child Protective Services Worker for his offenses. Respondent argues that the disciplinary action was appropriate for the offenses committed. Grievant argues that the demotion was excessive and inconsistent with discipline administered to another supervisor committing the similar offense of sending a Case Aide on a personal errand. Unlike Grievant, that supervisor received a three day suspension for her multiple offenses. Respondent does not have a written policy concerning employees' children in the workplace. Grievant has successfully demonstrated the affirmative defense that the penalty he received was clearly excessive and indicated an abuse of discretion. Accordingly, this grievance is GRANTED.</p>

KEYWORDS: OVERTIME; PAY GRADE; VOLUNTEER; CLASSIFICATION; POLICY

CASE STYLE: HAMMONS v. DIVISION OF CORRECTIONS/ANTHONY CORRECTIONAL CENTER
DOCKET NO. 2011-0304-MAPS (1/27/2012)

PRIMARY ISSUES: Whether Grievant demonstrated that Operational Procedure 302.01 violated Policy Directive 129.02, or that any law, rule, regulation, policy, or procedure required that he be allowed to work overtime in classifications in lower pay grades than his own.

SUMMARY: Grievant believes the Operational Procedure related to who could work overtime, put in place by the Warden at Anthony Correctional Center in July 2010, violated the Policy Directive applicable to all Correctional Institutions, because the Operational Procedure did not allow employees in Grievant's classification and pay grade to work overtime in classifications and pay grades below theirs, thus reducing his overtime hours and pay. Grievant believed he was entitled to payment for overtime he should have been allowed to work from July 2010 to May 5, 2011, when the new Warden at Anthony Correctional Center changed the overtime Operational Procedure, permitting him to work overtime hours again in classifications in lower pay grades. Grievant did not demonstrate that the Operational Procedure was in conflict with the Policy Directive, or that he was otherwise entitled to work any overtime. Accordingly, this grievance is DENIED.

KEYWORDS: SUSPENSION; INSUBORDINATION; CHILD ABUSE AND NEGLECT; MITIGATION; GOOD CAUSE; PHYSICAL ABUSE

CASE STYLE: GOAN v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES
DOCKET NO. 2011-0876-DHHR (1/19/2012)

PRIMARY ISSUES: Whether Grievant was properly suspended for insubordination.

SUMMARY: Grievant was suspended for ten days without pay based upon allegations of insubordination and failure follow directives given by three supervisors. Specifically, Grievant was charged with failing to properly and promptly investigate a report regarding a six month old infant that allegedly weighed less than eleven pounds and had seven knots on his head and bruises all over his body. Grievant alleges that the complaint was received on a holiday weekend and she made an appropriate but unsuccessful attempt the locate the child. She was told by family members that the child was fine. Grievant admits that she was told by her supervisors to locate and examine the child on the first morning she returned to the office but she was ill and could not complete that task. Respondent notes that investigations of child abuse are extremely important and must be investigated as quickly as possible. While Grievant made some attempts to locate the child during the weekend, she was specifically instructed to personally see the child the first thing upon returning to the office. Grievant did not tell her supervisors that she was ill so they could immediately assign another employee to locate the child. Given the totality of the circumstances, Respondent proved that the discipline of Grievant was justified. Accordingly, the grievance is DENIED.

<u>KEYWORDS:</u>	SUSPENSION; REPRISAL; PRIMA FACIE; DISCIPLINARY ACTION; UNAUTHORIZED LEAVE; WORK SITE; BREAK; PROGRESSIVE DISCIPLINE; INSUBORDINATION
<u>CASE STYLE:</u>	<u>LILLY v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/JACKIE WITHROW HOSPITAL</u> DOCKET NO. 2011-1723-CONS (1/26/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent followed progressive discipline when it suspended Grievant for insubordination.
<u>SUMMARY:</u>	Grievant, a Laundry Worker for Respondent, is the chief steward for the hospital's chapter of the West Virginia Public Workers Union, UE Local 170. Respondent asserts that it followed progressive discipline when it suspended Grievant for one day for her first offense of leaving the worksite without prior authorization and for three days for her second offense of leaving the work area without authorization for time beyond her permitted break time. Grievant asserts that because both occurrences of Grievant being away from the worksite or work area without authorization involved union activity, that Grievant's discipline was retaliatory. Accordingly, the grievance is DENIED.
<u>KEYWORDS:</u>	TERMINATION; GOOD CAUSE; VERBAL ABUSE; PATIENTS; MISCONDUCT; NEGLECT
<u>CASE STYLE:</u>	<u>CRITES v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WILLIAM R. SHARPE, JR. HOSPITAL</u> DOCKET NO. 2011-0890-DHHR (1/24/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent met its burden of proof and demonstrated by a preponderance of evidence that Grievant engaged in gross misconduct which led to his termination.
<u>SUMMARY:</u>	Grievant was charged with verbal abuse and exploitation of hospital patients while performing his duties as a health service worker. Respondent met its burden of proof and demonstrated by a preponderance of the evidence that Grievant's termination was for good cause. Accordingly, this grievance is DENIED.